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No. 72-1598

IN THE

Supreme Court of the United States

October Term, 1972

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BELL AEROSPACE COMPANY DIVISION
OF TEXTRON INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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POINT I

The petition fails to establish any of the grounds for granting certiorari set forth in Rule 19 and should be dismissed.

The petition fails to meet the test of Rule 19—review of cases by way of certiorari is not granted merely to give the defeated party in the Court of Appeals another hearing. *Magnum Co. v. Coty,* 262 US 159, 163 (1923). It is apparent from the statement of questions presented

that petitioner, having lost below, simply seeks another bite of the apple in an attempt to correct the alleged error of the Court of Appeals. Fairly paraphrased, the questions presented by petition are:

> 1. Did the Board properly determine that "Managerial employees are covered by the National Labor Relations Act?"
>
> 2. Did the Court of Appeals improperly require the Board to conduct rule making? (petition, p. 2)

In attempting to state the reasons for granting the writ, the petition makes even more clear the inappropriateness of the application. Given as reasons for granting the writ are:

> 1. The holding of the Court of Appeals is erroneous. (petition, p. 8)
>
> 2. The Board correctly held that Congress did not intend to exclude managerial employees from coverage under the Act. (petition, p. 14)
>
> 3. The Court further erred in requiring the Board to proceed through rule making rather than on an adjudicatory basis to determine coverage of the Act. (petition, p. 16)

Neither petitioner's claim of these alleged errors of the Court of Appeals nor the Board's view of the correctness of its own decision are proper reasons for granting certiorari. Furthermore, it is not unreasonable that the Board resort to rule making rather than *ad hoc* decision before overturning long established precedents in so important an area.

Lacking valid argument for certiorari, the petition is largely given over to a lengthy reargument of the facts and law of the case in an attempt to persuade this Court of the merits of petitioner's position. Even if petitioner's

analysis of the facts were not strongly slanted in its own favor,[1] certiorari is not granted to review the evidence and discuss the facts. *United States v. Johnson*, 268 US 220, 227 (1925). Where factual issues have been considered upon certiorari by this Court, it is where the decision below appears so shockingly wrong as to present serious substantial questions of due process. *Thompson v. City of Louisville*, 362 US 199 (1960). The petition does not even attempt such a factual showing in the present case. This effort by the Board to again argue the merits of its position does not form a proper basis for granting the petition.

The petition also fails to establish that the Court of Appeals has decided the question in a way which conflicts with the decisions of this Court or has so far departed from the accepted and usual course of judicial proceedings as to require the intervention of this Court.

Petitioner's attempt to reach this basis for granting the writ is based on *Security and Exchange Commission v. Chenery Corp.*, 332 US 194 (1946), and *N. L. R. B. v. Wyman-Gordon Co.*, 394 US 759 (1969). It contends that the Second Circuit erred in directing rule making. Both cases are clearly distinguishable.

Chenery Corp. was, as this Court was careful to point out, a case of first impression where ". . . the Commission which had not previously been confronted with the

[1] Reference to the purchase of fuel oil, light bulbs, packaging supplies and paper by the buyers, when in fact 70% of Bell's business is production of sophisticated missile and weaponry requiring the buyers to act as chief of the combined management team for the purchase of special items according to detailed specifications and blueprints and the failure to mention one of the buyers within the group committed $1,351,983 in a 19 month period, illustrate petitioner's attempt to slant and argue factual issues which have no place in a proper petition for certiorari. Compare petitioner's statement of the facts (petition, pp. 3-4) with the impartial statement of the Court (petition, pp. 22-23).

problem of management trading during reorganization was (not) forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct." (p. 203) The petition here presents not a case of first impression but a case where both the Eighth and Second Circuits have concurred in following a long line of similar decisions by the Board itself.

Where a clear precedent has been established, the general rule of *Chenery Corp.* that new law should be made prospectively through the exercise of rule making powers, should apply rather than the exception to the general rule which petitioner seeks to invoke. As *Chenery Corp.* points out, the case-by-case adjudication exception should be reserved for cases of first impression and problems not previously confronted by the administrative agency.

To unravel case-by-case a rule carefully woven as to who is and who is not a managerial employee would produce utter confusion. After 37 years of court and Board decisions under the Labor Management Relations Act, the threshold question of who is "management" and who is "labor" would be examined *de novo* under the "labor sensitive" criteria now urged by the Board to upset the decisions of the Eighth and Second Circuits. (See Point II, *infra.*)

In *Wyman-Gordon Co.*, four Justices held that a specific order of the Board requiring an employer to disclose a list of its employees in a representation case was enforceable, though an earlier attempt to reach the same result by a procedurally defective rule-making process was invalid. Three Justices thought that the defective rule-making procedure was nevertheless a valid adjudication. This case does not help petitioner here. The general impact of both cases supports the rule making approach adopted by Chief Judge Friendly below.

POINT II

The record amply establishes a sound basis for denying certiorari.

The decision of both Circuit Courts which have squarely considered the question of coverage under the Labor Management Relations Act for managerial employees are in agreement, not conflict. *Bell Aerospace Company Division of Textron Inc. v. N. L. R. B.*, 475 F. 2d 485 (CA2, 1973); *N. L. R. B. v. North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602 (CA8, 1971). This concededly important Federal question of coverage under the Act has been considered in numerous and well settled Board and Court decisions over the 37 year history of this legislation and has culminated in the concurrence of both the Eighth and Second Circuits.

The Board simply disagrees and would unsettle this long line of cases in order to establish its new "conflict of interest" or "labor sensitive" touchstone as a basis for jurisdiction under the Act.[2] The claim, page 18 of the petition, that this touchstone of coverage is not novel, is simply not so. It is directly contrary to the position taken by the Board itself on its brief to the Second Circuit where, with a candor now lacking, the Board stated:

> "While the Board's decision in *North Arkansas* and in the instant case, marked a change in Board policy, it is well settled that the Board may change its policy 'if in so doing, it (does) not act arbitrarly or in violation of the Act.' "

[2] The Eighth Circuit emphatically rejected this test. The idea that "management" under the Act is limited to "labor sensitive" positions suggests that management will now bargain with management—labor sensitive on one side of the table and management—non-labor sensitive on the other—certainly a new concept in labor-management relations.

Having failed to persuade the Second Circuit that it was entitled *sua sponte* to change its policy with respect to coverage under the Act, the Board now attempts by this petition to claim that the argued for interpretation of coverage under the Act is "not novel." Petitioner's suggestion that its decision in *Swift & Co.*, 115 NLRB No. 105 (1956), is " an aberration" (petition, p. 18) is not true.[3] In *American Locomotive Company*, 92 NLRB No. 22 (1950), the Board also squarely rejected the Union's contention that buyers be placed in a separate unit. The Board, at pp. 117-118, stated:

> "As it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act."

Furthermore, the Board's decisions in *Swift & Co.* and *American Locomotive Co.* are not "single sweeping and inaccurate statement[s]" (petition, p. 15). To the contrary, they accurately reflect and are perfectly consistent with the rationale of the Board's numerous decisions excluding buyers from proposed units of other employees. Irrespective of the Board's present assertions, buyers were excluded

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[3] The Board in *Swift & Co.* held that procurement drivers, who made purchases for the employer's account, could not be included in a production and maintenance unit and would not constitute an appropriate separate unit. The Board stated:

> "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act, and deny the petitioners' alternate request."

because they are part of management,[4] not because they lacked community of interest with other employees sought to be included in the proposed units.[5]

---

[4] See, for example, *Interstate Company*, 125 NLRB No. 11 (1959) ("In accordance with customary Board policy, we will exclude these employees as managerial employees because of their buying function."); *W. W. Chambers Company*, 124 NLRB No. 135 (1959) ("The buyer spends about 60% of her time in buying supplies for the employer . . . By virtue of her purchasing activities . . . this employee effectively exercises a prerogative of, and is a representative of management. We therefore find that the interests of the buyer are allied with those of management. Accordingly, we shall exclude her . . ."); *Temco Aircraft Corp.*, 121 NLRB No. 145 (1958) ("Buyer A: This employee purchases materials for the company and is often required to pledge the company's credit. We find that Buyer A is managerial, and exclude him from the unit."); *Federal Telephone and Radio Company*, 120 NLRB No. 207 (1958) (". . . we find that buyers . . . exercise a prerogative of management . . . that their interests are allied with management and exclude them . . ."); *Mack Trucks, Inc.*, 116 NLRB No. 222 (1956) ("We find that the buyers and assistant buyers are managerial employees and shall exclude them."); *Plankinton Packaging Co.*, 116 NLRB No. 160 (1956) (". . . [he] (employee who made purchases for employer's account) exercises a prerogative of, and [is a] representative of management . . . [his] interests are allied with management and [we] exclude [him] from the appropriate units."); *Girdler Company*, 115 NLRB No. 109 (1956) ("We find . . . that the buyers are managerial employees whom we shall exclude . . ."); *Sunnyland Packing Co.*, 113 NLRB No. 12 (1955) (". . . the interests of both these employees [beef buyers] are clearly associated with management. We shall, in accord with our usual practice, exclude them . . ."); *Federal Telecommunication Laboratories, Inc.*, 92 NLRB No. 206 (1951) (". . . in accordance with our established policy, [we shall] exclude them from the unit as managerial employees who have the authority to pledge the company's credit in making purchases."); *Wm. P. McDonald Corp.*, 83 NLRB No. 66 (1949) (". . . his interests are closely connected with those of management. Accordingly, we shall exclude the fruit buyer . . ."); *Denton's Inc.*, 83 NLRB No. 3 (1949) (". . . the interests of the buyers . . . are more closely identified with management than with the other employees . . . in accordance with our policy . . . we shall exclude all buyers . . .").

[5] When the Board wishes to exclude an individual from a proposed unit due to a lack of community of interest, it specifically says so. In *Western Gear Corporation*, 160 NLRB No. 25 (1966), the Board

(Footnote continued on following page)

Contrary to the very purpose of Supreme Court review, the argument advanced by the Board upon this petition would, by upsetting a long line of cases, create a state of confusion with respect to coverage under the Act in this important area of labor-management relations. The Board and the courts will then have to fashion anew the distinction between covered and non-covered employees—a distinction which already has been carefully, consistently and painstakingly established over a 37 year period.

(Footnote continued from preceding page)
excluded buyers and buyers follow-up because of their "exercise of managerial responsibility" and then excluded an outside buyer follow-up, who did not pledge the employer's credit, because he lacked a community of interest with others in the proposed unit. If all were excluded because they lacked a community of interest why would the Board assign different reasons in excluding these employees? The reason, of course, is that buyers are not excluded because they lack a community of interest, but because, as managerial employees, they are not considered to be covered by the Act.

Conclusion

Petition incorrectly urges error of the Court below as a basis for granting certiorari and improperly seeks to review the concurring decisions of the Eighth and Second Circuits on the well-established question of coverage under the Labor Management Relations Act. Under the sound considerations established by this Court, the petition should be denied and the long line of cases delineating coverage of "managerial employees" under the Labor Management Relations Act should be left undisturbed.

Respectfully submitted,

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 21–45) [1] is reported at 475 F. 2d 485. The Board's decision and order (Pet. App. C, pp. 47–59) are reported at 197 NLRB No. 30. The Board's decision in the underlying representation case (Pet. App. D, pp. 60–68) is reported at 190 NLRB 431; its order denying reconsideration in that proceeding (Pet. App. E, pp. 69–75) is reported at 196 NLRB No. 127.

[1] "Pet. App." refers to the appendix to the petition. "A." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 46) was entered on February 28, 1973. The petition for a writ of certiorari was filed on May 29, 1973, and was granted on October 9, 1973 (A 299). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 35–38.

QUESTIONS PRESENTED

1. Whether the Board properly determined that "managerial employees" are covered by the National Labor Relations Act unless their duties are likely to cause a conflict of interest between their job responsibilities and their responsibilities to a labor organization.

2. Whether the court of appeals improperly required the Board to conduct rule-making rather than adjudicatory proceedings to determine whether certain employees are covered by the Act.

STATEMENT

A. THE BOARD PROCEEDINGS

On July 30, 1970, the Union [2] filed a representation petition with the Board, seeking certification as the bargaining representative of the 25 buyers in the Purchasing & Procurement Department of the Company's

[2] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286.

Wheatfield, New York plant, which manufactures and sells rocket engines and electronic equipment (A. 7). The Company opposed the petition on the grounds that the buyers were managerial employees and thus excluded from coverage of the Act (A. 8, 86–87).

At the representation hearing, the following facts were established:

The Purchasing & Procurement Department fills orders from 30 other departments (A. 26). This involves purchasing all of the Company's needs, including maintenance and repair items such as fuel oil and light bulbs, support items such as packaging and paper, and production items ranging from simple nuts and bolts to sophisticated components for the equipment the Company manufactures (A. 26, 35–38, 41). Many purchases are "off the shelf" items, which can be obtained from a number of sources. Other items must be made up according to the Company's specific needs (A. 26, 35–36).

The buyers in this Department work under a Procurement Director, an Assistant Procurement Director, two purchasing agents, and four supervisors for particular categories of purchases (A. 50, 198). There are no educational or formal training requirements for the buyers, who are guided in their work by a detailed procurement manual (A. 49–50, 64–65, 80–82, 146–148, 201–206, 209, 211–212, 234). The buyers, whose salaries range from $195 to $271 weekly, are not paid for casual overtime, but are compensated for scheduled overtime which has been authorized by a supervisor (A. 46–47,

150–151). Although not paid an hourly rate, the buyers must receive supervisory permission to take a long lunch period or to leave the plant early (A. 152–153).

Purchase orders are initiated by requisitions from the various departments. These go first to the Finance Department for approval and are then sent to the Procurement Department, where they are assigned to a supervisor who in turn assigns them to a particular buyer (A. 58–60, 208). Requisitions for items which have been ordered previously generally specify a particular vendor; indeed, requisitions for some frequently-ordered items are computerized (A. 60, 123–124, 262). Where no vendor has been designated on the requisition, the buyer is free to select one (A. 59, 134–137). Where the requisition is for material which must be made to the Company's specification, it is accompanied by detailed blueprints and other technical plans (A. 100–101, 105–106). When obtaining sophisticated production items—such as material for the Minute Man missile project, which represents 70 percent of the Company's sales—purchasing decisions are made by a team of supervisory personnel from the engineering, quality assurance, finance, and manufacturing departments (A. 78–82).

Buyers may place or cancel orders of less than $5,000 on their own signature. Larger orders require supervisory approval, with higher levels of approval required as the cost rises (A. 30–32, 163, 201–206). On orders of more than $5,000, the buyer is required to conduct "prenegotiations" with supervisory personnel in the department and to obtain their "complete con-

currence" before initiating a contact with a potential vendor (A. 32, 79, 206, 231). Buyers must secure supervisory approval for changes in procurement (A. 181, 213, 215, 218).

The Board, following its decision in *North Arkansas Electric Cooperative, Inc.*, 185 NLRB 550, where it had held "'managerial' employees to be employees within the meaning of the Act and entitled to its protection," concluded that, "even though, as the Employer argues, the buyers may be 'managerial' employees, * * * as employees they are entitled to be represented under the Act, unless there is some cogent reason for denying such representation" (Pet. App. D, p. 61).

The Board found no such "cogent reason" here, rejecting as "unsupported conjecture" the Company's claim that the buyers' authority to commit the Company's credit, to select suppliers, and to influence "'make or buy' decisions" created "a potential conflict of interest between the buyers as union members and the Employer" (Pet. App. D, pp. 62–63). The Board stated that, "While it is true that the buyers are in a position to commit the Employer's credit, the record reveals that the discretion and latitude for independent action must take place within the confines of the general directions which the Employer has established. * * * the buyers cannot commit the Employer's credit for amounts above $5,000 without the concurrence of higher authority" (Pet. App. D, pp. 62–63).[3]

[3] In the paragraph of the Board's decision reprinted at the bottom of Pet. App. 62, a line, which we have italicized below, was inadvertently omitted. The sentence beginning "Thus policy

The Board also found no "merit in the Employer's contention that any hiring and discharge restrictions likely to follow certification will affect its ability to deal with the employees." For, "[t]he Employer would still retain the power to discipline or discharge employees for improper performance of duty, subject only to such limitations as he might agree to during negotiations" (Pet. App. D, p. 63).

Accordingly, the Board held that the Company's buyers were entitled to representation rights under the Act, and, finding that a unit of buyers was appropriate for collective bargaining purposes, it directed an election in that unit (Pet. App. D, pp. 64–66). The Union won the election by a vote of 15 to 9, and was certified by the Board as the buyers' bargaining representative (Pet. App. D, pp. 66–68).

The Company moved the Board for reconsideration, noting that the Eighth Circuit had recently denied enforcement of the Board's order in *North Arkansas Electric, supra.*[4] The Board denied reconsideration (Pet. App. E, pp. 69–75), stating that it disagreed with the holding of the Eighth Circuit that Congress, in 1947, had manifested an intent to exclude all managerial personnel from the coverage of the Act. In

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guides" should read as follows: "Thus policy guides for 'make or buy' decisions can clearly be established and enforced, so that any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled *by the employer. Additionally, the record reveals that* the buyers cannot commit the Employer's credit for amounts above $5,000 without the concurrence of higher authority."

[4] *National Labor Relations Board* v. *North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602.

the Board's view, Congress intended only to preserve the Board's practice of excluding "personnel associated with the formulation and implementation of labor relations policies," which the buyers clearly were not. (Pet. App. E, pp. 72–73.) The Board concluded that, in determining whether employees who have discretion in the formulation, determination, and effectuation of other employer policies are excluded from the Act, "the fundamental touchstone" is whether their duties and responsibilities "do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization" (Pet. App. E, p. 74). Applying that criterion, the Board affirmed its earlier findings that union representation of the Company's buyers would not tend to create a conflict of interest, and that there was a sufficient community of interest among these buyers so that they constituted a separate appropriate unit for collective bargaining (Pet. App. E, p. 75).

The Company refused to bargain with the Union, an unfair labor practice complaint issued, and the Board found that the Company had violated Section 8(a)(5) and (1) of the Act. The Board ordered the Company to bargain with the Union. (Pet. App. C, pp. 47–59.)

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals concluded that all true managerial employees are excluded from the coverage of

the Act.[5] The Court reasoned as follows (Pet. App. A, pp. 38–39):

> The 1947 Congress clearly believed that at least some "managerial employees" other than "supervisors" were excluded from the protections of the Act. [Footnote omitted.] In 1956 the Board concluded that the Congress had meant to exclude all true "managerial employees." This exclusion embraced not only an employee "so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other" but also one who is "formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties," *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F. 2d 37, 41 (7 Cir. 1969). Both because of what we believe to have been the understanding of the 1947 Congress and because the Board's interpretation of it had been so clearly defined for the 1959 Congress, the Board is not now free to decide the contrary * * *.

The court added, however, that "the Board would [not] be precluded, on proper proceedings, from determining that buyers, or some types of buyers, are not true 'managerial employees' and consequently come within the protection of § 8(a)(5) and (1)" (Pet. App. A, p. 39). It ruled that there was "substantial

[5] As noted (n.4, *supra*), the same conclusion was reached by the Eighth Circuit in *National Labor Relations Board* v. *North Arkansas Electric Cooperative, Inc.*, *supra*. See also *National Labor Relations Board* v. *Wheeling Electric Co.*, 444 F. 2d 783 (C.A. 4).

evidence that Bell's buyers were not sufficiently high in the hierarchy to constitute 'managerial employees' as that term has been defined" in *Illinois State Journal-Register, supra* (Pet. App. A, p. 39). Nevertheless, the court denied enforcement of the Board's order for two reasons.

First, "we cannot be sure that the Board's decision rested on such a factual determination rather than on its new and, in our view, erroneous holding that it was free to regard *all* managerial employees as covered by the Act unless their duties met" the conflict of interest touchstone (Pet. App. A, p. 40). Second, "while the Board was not precluded from reversing itself on the position that buyers, or some buyers, were not 'managerial employees,' we hold that, particularly in light of the justified contrary belief the Board had engendered, it could not do this in the manner that was done here"; rather, it should have conducted a rule-making proceeding in conformity with Section 4 of the Administrative Procedure Act, 5 U.S.C. 553 (Pet. App. A, pp. 40–41). The court remanded the case to the Board to conduct a rule-making proceeding (Pet. App. A, pp. 43–45).

SUMMARY OF ARGUMENT

I

Under the Wagner Act, the Board held that both "managerial" and "supervisory" employees were included within the Act's broad definition of "employee," and thus covered by the Act. The Board, however, excluded managerial and supervisory employees

from bargaining units of other employees on the ground that they lacked a sufficient community of interest with these employees, or they had a confidential relationship with the employer in matters concerning labor relations. In *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U.S.C. 485, this Court sustained the Board's determination that foremen were protected by the Act, and that a unit limited to foremen was appropriate for collective bargaining.

In the 1947 amendments to the Act, Congress overturned the *Packard* ruling by specifically excluding *supervisory employees* from the coverage of the Act. But it narrowly defined "supervisor" so as to encompass only those who were vested with genuine authority to direct or affect the employees' working conditions. Moreover, although the legislative history of the amendment shows that Congress intended to exclude from coverage one class of managerial employees—*i.e.,* "persons working in the labor relations, personnel and employment departments"—because their unionization would create a conflict of interest with their employment duties, it did not otherwise alter the Board's preexisting practice with repect to managerial employees.

In light of this legislative history, the Board correctly concluded that Congress did not intend to exclude all managerial employees from the coverage of the Act. Rather, Congress left it to the Board to determine which managerial employees should be excluded on the basis of whether such a conflict of interest was likely to result.

Contrary to the conclusion of the court below, the Board's position gives full effect to the view of the dissenting Justices in *Packard, supra,* which prompted Congress to exclude supervisors from the coverage of the Act. The dissenters believed that the Act should be construed as putting "in the employer category all those who acted for management not only in formulating but also in executing its labor policies" (330 U.S. at 496). The Board's conflict of interest test would exclude from the coverage of the Act managerial employees who were so involved with labor policies.

The buyers here have no responsibilities in the personnel or labor relations fields. The Board correctly found, upon examination of their duties and responsibilities, that their discretion to choose vendors or influence "make or buy" decisions was or could be sufficiently limited "so that any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled by the Employer" (Pet. App. D, p. 62). Accordingly, the Board properly found them not to be the kind of managerial employees who were excluded from the coverage of the Act.

II

Even if the court below were correct in holding that "all true managerial employees" are excluded from the Act, it erred in holding that the Board could determine whether the buyers here are "true managerial employees" only through a rule-making proceeding. "The choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies

primarily in the informed discretion of the administrative agency." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203.

The Board acted within its discretion in determining in an adjudicatory proceeding whether the duties of the Company's buyers presented the possibility of a conflict of interest. Contrary to the view of the court below, the Board was not enunciating a novel principle, but was merely applying an established principle to a particular group of employees. Moreover, there are hundreds of thousands of buyers employed in American industry, and their duties vary from industry to industry, within any given industry, and even within a particular company. In these circumstances, a rule-making proceeding is likely to produce only broad general standards which would be of little value until they were subsequently applied to particular fact situations. Nothing in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, requires a rule-making proceeding here.

ARGUMENT

I. MANAGERIAL EMPLOYEES ARE COVERED BY THE NATIONAL LABOR RELATIONS ACT UNLESS THEIR DUTIES ARE LIKELY TO CAUSE A CONFLICT OF INTEREST BETWEEN THEIR JOB RESPONSIBILITIES AND THEIR RESPONSIBILITIES TO A LABOR ORGANIZATION

A. THE BOARD AND COURT DECISIONS PRIOR TO 1947

Section 2(3) of the Wagner Act provided that "The term 'employee' shall include any employee * * * but shall not include any individual employed as an agricultural laborer, or in the domestic service of any

family or person at his home, or any individual employed by his parent or spouse * * *." The Board early ruled that the statutory definition is of wide comprehension, and that it covered "managerial" and "supervisory" employees.[6] *Atlantic Greyhound Corp.*,

[6] Managerial employees are ordinarily defined as "employees who are in a position to formulate, determine and effectuate management policies. These employees * * * express and make operative the decisions of management." *Ford Motor Co.*, 66 NLRB 1317, 1322. They are not necessarily concerned with labor relations. For examples of the types of employees whom the Board has considered to be managerial, see *Spicer Mfg. Corp.*, 55 NLRB 1491, 1498 (expediters who placed and reassigned orders to expedite tool delivery); *Vulcan Corp.*, 58 NLRB 733, 736, and *Swift & Co.*, 115 NLRB 752, 753 (buyers who spent a substantial part of their time making purchases for the employer's account); *General Telephone Co. of Ohio*, 112 NLRB 1225, 1229 (local commercial representatives who dealt with the public, including handling their complaints); *Hunt & Mottet Company*, 206 NLRB No. 85, 84 LRRM 1243 (buyers vested with "substantial degree of discretion in their decisions and * * * able to pledge large amounts of employer's credit"). For examples of employees held not to be managerial, see *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (manager of one-employee store with limited discretion to set prices); *Illinois State Journal-Register, Inc.* v. *National Labor Relations Board*, *supra*, 412 F. 2d at 41–43 (C.A. 7) (managers of newspaper delivery service with limited authority with respect to management policy); *Retail Clerks Int'l Ass'n* v. *National Labor Relations Board*, 366 F. 2d 642, 644–645 (C.A.D.C.), certiorari denied, 386 U.S. 1017, and *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 339 F. 2d 116, 123 (C.A. 2) (union representatives whose exercise of discretion was limited by established policy).

In addition, the class of managerial employees includes persons, sometimes referred to as "confidential" employees, who, though not engaged in formulating and effectuating the employer's policies, work as, or for, management representatives in the area of labor relations (see, *infra*, pp. 14–16).

Supervisory employees, on the other hand, are generally considered, and are now defined by the Act, as employees who have

7 NLRB 1189, 1196; *Southern Colorado Power Co.*, 13 NLRB 699, 719, enforced, 111 F. 2d 539 (C.A. 10); *Dravo Corp.*, 54 NLRB 1174, 1177; *Soss Mfg. Co.*, 56 NLRB 348, 353–354. See also *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. 2d 667, 671 (C.A. 8).

The Board also held, however, that managerial employees could not be included in bargaining units of rank-and-file employees. Thus, in *Vulcan Corp., supra*, 58 NLRB at 736, a buyer who spent 75 percent of his time away from the plant was excluded from a production and maintenance unit "[b]ecause of the responsibility of his position and his peculiar relationship to management, and * * * the fact that his interests are apparently different from those of the production and maintenance employees * * *." In *Hudson Motor Car Co.*, 55 NLRB 509, 512, the Board excluded from a clerical unit buyers who "purchase all materials required by the Company," because "their duties are closely allied to management, differing materially from those of the other clerical employees." See also *Friez & Sons*, 47 NLRB 43, 47; *Electric Controller & Mfg. Co.*, 69 NLRB 1242, 1245–1246; *Barrett Division, Allied Chemical & Dye Corp.*, 65 NLRB 903, 905.

Similarly, the Board excluded from bargaining units of other employees persons who were managerial

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authority "to hire, transfer, suspend, * * * or discipline other employees * * *." See Section 2(11) of the Act, reprinted at Pet. App. 77.

in the sense that they had access to confidential information concerning, or acted for management in, labor relations matters. Thus, in *Murray Ohio Mfg. Co.*, 61 NLRB 47, 57, the Board excluded from a broader bargaining unit time-study men who "set wage rates and participate in bargaining conferences * * * [because] * * * they are managerial employees bearing a confidential relationship to the Company in matters concerning labor relations"; at the same time, it refused to exclude the employees of the Design Drafting Department because, although they "have access to information important to the Company from a business point of view, there is nothing to indicate that they have confidential knowledge concerning labor relations * * *." In *The Babcock & Wilcox Co.*, 52 NLRB 900, 903, the Board excluded from bargaining units of other employees "employees of the personnel department [who] necessarily are conversant with information concerning labor relations," and "secretaries to executives, since it appears that their stenographic duties entail working on correspondence which at times concerns labor relations"; but, the Board included accounting department employees, for, although "their work has its confidential aspects, it is not concerned with labor relations." See also *American Can Co.*, 55 NLRB 530, 532–533; *Electric Auto Lite Co.*, 57 NLRB 723, 725–726; *Saco-Lowell Shops*, 61 NLRB 898, 899–900; *Walter Kidde and Co., Inc.*, 64 NLRB 1050, 1052–1053. None of these exclu-

sions meant that such employees were not covered by the Act, but simply that it was not appropriate to include them in a bargaining unit with other employees.[1]

The Board also generally excluded supervisory employees from units of rank-and-file employees. See *Mueller Brass Co.*, 39 NLRB 167, 171; *Godchaux Sugars, Inc.*, 44 NLRB 874, 878. For a time, it held that even a separate unit of supervisory personnel would not be appropriate for collective bargaining. *Maryland Drydock Co.*, 49 NLRB 733. It nonetheless regarded supervisors as employees under the Act and protected thereby against discharge for engaging in union activity. *Soss Mfg. Co., supra.* In *Packard Motor Car Co.*, 61 NLRB 4, the Board reversed *Maryland Drydock* and returned to its earlier view

[1] In *Ford Motor Co.*, 66 NLRB 1317, the Board narrowed the definition of "confidential" employee, stating (*id.* at 1322):

"We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we have considered and still deem to be 'managerial,' in that they express and make operative the decisions of management.

"We have also excluded from units of rank and file employees persons who, in the regular course of their duties, have access to confidential data bearing directly upon the employees' labor relations, designating them as 'confidential.' However, upon reappraisal, we are of the opinion that this definition is too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests. Consequently, it is our intention to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." [Footnote omitted.]

(see *Union Collieries Coal Co.*, 41 NLRB 961) that a separate unit of foremen was appropriate for bargaining purposes. In so doing, it emphasized that under "our consistent and now well settled position * * * supervisors are 'employees' within the meaning of Section 2(3) of the Act" (*id.* at 6).[8] This Court, by a 5–4 vote, sustained the Board's decision in *Packard*, finding "no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests." *Packard Motor Car Co.* v. *National Labor Relations Board, supra*, 330 U.S. at 490.[9]

B. THE 1947 AMENDMENTS TO THE ACT

In the 1947 Taft-Hartley amendments to the Act, Congress, overturning *Packard*, provided that supervisory employees are not subject to the Act at all. Both the language of the Act and the legislative history show, however, that Congress did not intend also to exclude from coverage under the Act all of those employees whom the Board had previously excluded

[8] The Board added that its refusal in *Maryland Drydock Co.*, to find appropriate a unit of supervisory personnel was not based on the ground that supervisors were excluded from the Act, but on the view that "the policies of the Act would not be effectuated by the establishment of bargaining units composed of supervisory employees" (61 NLRB at 8). See *Packard Motor Car Co.* v. *National Labor Relations Board*, *supra*, 330 U.S. at 492, n. 3.

[9] The dissenting Justices in *Packard* were of the view that the Act should be construed as putting "in the employer category all those who acted for management not only in formulating but also in executing its labor policies." 330 U.S. at 496; see also *id.*, at 500.

from rank-and-file bargaining units as "managerial" personnel.

The House Bill excluded supervisors from the definition of employee, and defined a supervisor as including not only those individuals with power to hire, transfer, promote, discharge, reward, or discipline other employees, or effectively to recommend such action, but also: (1) personnel who fix or make effective recommendations with respect to the wages earned by other employees, and those who make effective recommendations with respect to the application of factors upon which wages are determined; (2) labor relations, time-study, police and guard personnel; and (3) confidential employees. The Bill defined the latter as any individual "who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." Sec. 2(12) of H.R. 3020, 80th Cong., 1st Sess. 10–11, as passed by the House, 1 Legislative History of the Labor Management Relations Act, 1947 (hereafter "Leg. Hist.") 167–168.

The House Report explained that, "when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them." H. Rep. No. 245, 80th Cong., 1st Sess. 14; 1 Leg. Hist. 305. Respecting the exclusion of confidential employees, the House Report added: "The Board, itself, normally excludes from bargaining units

confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees." H. Rep. No. 245, *supra*, at 23; 1 Leg. Hist. 314. Whether the House bill would have excluded buyers such as those in the present case is doubtful, but we need not speculate as to that for the Senate bill, which was ultimately adopted, was significantly narrower in its exclusions.

The Senate Bill excluded supervisors from the coverage of the Act, but defined that term more narrowly:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, [or responsibly to direct them],[10] or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [Sec. 2(11) of S. 1126, 80th Cong., 1st Sess. 6; 1 Leg. Hist. 104.]

The Senate Report explained that unionization of supervisors "into organizations composed of or subservient to the unions of the very men they were hired

[10] This clause was added on the floor by Senator Flanders. 93 Cong. Rec. 4677–4678; 2 Leg. Hist. 1303–1304.

to supervise" had led to a diminution in disciplinary action by supervisors and an increase in industrial accidents, and threatened to deprive management "of the undivided loyalty of its foremen." The Report added: "In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in [the] act. It has therefore distinguished between straw bosses, leadmen, set-upmen, and other minor supervisory employees * * * and the supervisor vested with such genuine management prerogatives as the right to hire, or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess. 3–5; 1 Leg. Hist. 409–411.[11]

The debate on the bill in the Senate makes clear that the narrower Senate definition represented a rejection of the views of those who, instead of merely overturning the *Packard* decision, wanted to exclude wider categories of employees from the Act. The following colloquy is particularly revealing:

[11] The Senate Report pointed out that, by restricting the exclusionary provision "to the front line of management," the Senate definition "has fully met some of the technical criticisms to the corresponding section referred to in the President's veto of that [the Case] bill." S. Rep. No. 105, *supra*, at 5; 1 Leg. Hist. 411. In his veto message of the Case bill, which had passed Congress the previous year, President Truman had expressed concern that the bill "would strip from supervisory employees the rights of self-organization and collective bargaining now guaranteed them under the National Labor Relations Act. * * * The full right of supervisory employees to the benefits of collective bargaining is one that cannot be lightly thrown aside. On the other hand, management is entitled to

Mr. AIKEN. The Senator will recall and I think it should be in the RECORD, that the definition of a supervisory employee was considerably changed in committee. As originally written into the bill, it included night watchmen, timestudy men, all guards, and many other types of workmen, who very clearly were not supervisors.

Mr. ELLENDER. The Senator is correct.

Mr. AIKEN. The committee then more closely defined the word "supervisor," to include supervisors in fact, rather than all the other groups of employees whom some employers would like to have had included in the list of supervisory employees, so that such employees would not be able to join the union and gain the benefits of the Labor Relations Act.

Mr. ELLENDER. I may say to the distinguished Senator that, as I recall, the committee by its definition excluded guards from the original definition of supervisory personnel.

Mr. AIKEN. That is correct.

Mr. ELLENDER. Our amended definition also excludes the straw boss. What the committee did was to limit supervisory employees, by definition, to those having power to hire and fire for the benefit of the employer, and those who are permitted the exercise of independent judgment. That, in essence, is the definition of a supervisory employee. * * *

[93 Cong. Rec. 4136; 2 Leg. Hist. 1064–1065.]

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proper protection. Somewhere in the area of disagreement between the parties the line can be drawn with reasonable accuracy." 92 Cong. Rec. 6677.

The Conference Committee accepted the Senate's definition of supervisor. With reference to those additional employees who had been included within the House, but not the Senate, definition, the Conference Report stated:

> In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect.[12] * * * [H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35; 1 Leg. Hist. 539.]

In sum, prior to the 1947 amendments, the Board had held that the Act covered both managerial and supervisory employees, but that those employees should not be included in bargaining units with other employees. In the 1947 amendments, Congress specifically excluded supervisory employees from the coverage of the Act, but it narrowly defined "supervisor" so as to encompass only "the front line of management" (S. Rep. No. 105, *supra*, at 5; 1 Leg. Hist. 411)—those who had genuine authority to direct or affect the employees' working conditions. Congress did not alter

[12] The Conference Report errs in stating it was prevailing Board practice to treat the persons specified as "outside the scope of the act." As shown (pp. 14–16), the Board had generally held only that it was not appropriate to include such persons in bargaining units with other employees. See also Pet. App. A, p. 38, n. 13.

the Board's preexisting practice with respect to managerial—as opposed to supervisory—employees except in one respect. The legislative history evidenced an intention by Congress that "persons working in the labor relations, personnel and employment departments" whom it thought the Board had treated "as outside the scope of the act" (but whom the Board had usually merely excluded from units of other employees) would remain uncovered by the Act (*supra*, p. 22). The buyers at issue here are not such employees.

C. THE BOARD'S CONCLUSION THAT MANAGERIAL EMPLOYEES ARE EXCLUDED FROM THE COVERAGE OF THE ACT ONLY WHERE THERE IS LIKELIHOOD OF A "CONFLICT OF INTEREST" IS CONSISTENT WITH THE 1947 AMENDMENTS

In the light of this legislative history, the language of the Act, and the Board's past practice, the Board correctly concluded that Congress did not intend to exclude all managerial employees from the coverage of the Act, but rather left it to the Board to determine "those managerial types who ought properly to be excluded," on the basis of "an examination as to whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization" (Pet. App. E, p. 74).

First, many of the persons whom the Board has found to be managerial employees (see n. 6, *supra*) can hardly be considered "front line of management."

In view of the expressed congressional concern that the exclusion from coverage be narrowly drawn and that "minor supervisory personnel" not be denied the protection of the Act, it is unlikely that Congress, without stating so, intended to exclude "all managerial personnel, conceivably even those whose only 'managerial' functions involve a determination of what sources of supply should be used in making purchases of less than $5,000" (Pet. App. E, p. 72).

Second, the Board's prior exclusion of "persons working in the labor relations, personnel and employment departments" from rank and file units rested not merely on the fact that they were managerial employees, but "upon the premise that conflicts of interest are likely to arise between the collective employee group represented by a labor organization and personnel working as, with, or for management representatives whose area of responsibility includes bargaining with such a labor organization" (Pet. App. E, p. 72). See cases discussed, *supra*, pp. 14–16.[13]

Contrary to the conclusion of the court below, the Board's interpretation of the 1947 amendments gives full effect to the views of the dissenting Justices in *Packard, supra,* which prompted Congress to exclude supervisors from the coverage of the Act. As noted

[13] See also *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 398 F. 2d 669, 670 (C.A. 6): "The Board has long held that employees who 'assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations' are deemed confidential employees and may be excluded from a bargaining unit. * * * The broad rationale behind this rule is that employees should not be placed in a position involving a potential conflict of interests * * *."

(n. 9 *supra*), the dissenters believed that the Act should be construed as putting "in the employer category all those who acted for management not only in formulating but also in executing its labor policies." The Board's conflict of interest test excludes from the coverage of the Act managerial employees who are involved with labor policies. The employees here, however, have nothing to do with labor policies.

Nor does the Board's position with respect to managerial employees lead to the result prophesized in "the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives" (Pet. App. A, p. 34).[14] None of the employees in question here even approaches that level in the company hierarchy. Moreover, as the Board stated (Pet. App. E, pp. 73–74):

> * * * [A] corporate representative, charged with the duty of determining where an employer's plants should be located or what capital expenditures a corporation ought to make, may well have such broad managerial discretion as to necessarily involve the determination of matters affecting employment and employment policies that he should be excluded from coverage. It may be that his decisions inevitably will

[14] Justice Douglas stated in his dissent (330 U.S. at 494):

"[I]f foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application."

> encompass the field of labor relations, even though corporate organization charts may not, on their face, classify him as charged directly with labor relations policymaking.
>
> A like analysis might also dictate the exclusion of those bearing primary responsibility for determination of financial policies, or even those charged with the direction of basic policies in the field of research. * * * [15]

The conclusion of the court below that Congress intended to exclude all true managerial employees from the coverage of the Act rests upon grounds which do not withstand analysis. First, the court noted that the "1947 Congress clearly believed that at least some 'managerial employees' other than 'supervisors' were excluded from the protections of the Act" (Pet. App. A, p. 38). But, as we have shown (pp. 23–24, *supra*), the fact that Congress intended to exclude some managerial employees does not justify the conclusion that it intended to exclude all such employees. Second, relying on the Board's decision in *Swift & Co.*, 115 NLRB 752 (discussed below), the court ruled that "[i]n 1956 the Board concluded that the Congress had meant to exclude all true 'managerial employees,'" and that this interpretation "had been so clearly defined for the 1959 Congress, the

[15] There is no likelihood that the Board's view that managerial employees are covered by the Act unless there is a conflict of interest between their job and their union responsibilities would lead to a situation that, "while 'confidential secretaries' could not be organized, their bosses could be" (Pet. App. A, p. 34). The Board, in *Ford*, *supra*, n. 7, made clear that secretaries handling confidential matter were entitled to exempt status only to the extent that their bosses were.

Board is not now free to decide the contrary" (Pet. App. A, pp. 38, 39). The court has overstated the significance of *Swift*.

In *Swift, supra,* the Board held that a separate unit of poultry procurement drivers could not be considered appropriate for collective bargaining because the drivers were "representatives of management." In so holding, the Board stated that "[i]t was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management." Such individuals cannot be deemed to be employees for purposes of the Act" (115 NLRB at 753–754). This sweeping and inaccurate statement was contrary to numerous Board decisions immediately after the enactment of the 1947 amendments which held that managerial employees, not presenting a conflict of interest problem, were to be excluded from rank-and-file bargaining units,[16] but not from coverage of the Act. It cannot be taken as a contemporaneous interpretation of congressional intent, which did not go that far. Nor, if it is taken as a statement of Board policy,[17]

[16] See, *e.g., Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, n. 4; *Wise, Smith & Company, Inc.*, 83 NLRB 1019, 1021; *Westinghouse Electric Corp.*, 89 NLRB 8, 14.

Although the Board did state in *American Locomotive Co.*, 92 NLRB 115, 117 that the buyers there, as "managerial employees," could "not be accorded bargaining rights under the Act," the cases cited as authority (*Wise* and *Westinghouse, supra*) involved merely an exclusion of buyers from rank-and-file units.

[17] Thus, as the court below acknowledged (Pet. App. A, pp. 35–36, n. 11), the Board, in cases subsequent to *Swift*, merely held that managerial employees should be excluded from bargaining units of other employees.

And, despite the broad language in the Board's decision in *Swift*, the District of Columbia Circuit, in a secondary boy-

does it preclude the Board from modifying that policy—created by one adjudication—in a subsequent adjudication.[18] See *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674; *Packard Motor Car Co.* v. *National Labor Relations Board, supra*, 330 U.S. at 492. Since the 1959 amendments to the Act were concerned with secondary boycott and picketing, and not with the scope of coverage of managerial employees, Congress's silence regarding *Swift* when it considered these amendments was not a ratification or adoption of the Board's *Swift* decision.

D. THE BOARD WAS WARRANTED IN FINDING THAT THE BUYERS HERE WERE NOT THE KIND OF MANAGERIAL EMPLOYEES WHO WERE EXCLUDED FROM THE COVERAGE OF THE ACT

The buyers here have no responsibilities in the personnel or labor relations fields and are not high company officers. Nor was their discretion so broad that it allowed them to select vendors on the basis of whether the latter's employees were unionized.

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cott proceeding, interpreted it as being applicable only to buyers who, like those in *Swift*, were acting as agents of their employers. The court found that the buyers in the case before it, who were employed by meat markets, were "so identified with employee and Union activity as to be within the statutory meaning of 'employees' for purposes of section 8(b)(4)(A)." *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 237 F. 2d 20, 27 (C.A. D.C.), certiorari denied, 352 U.S. 1015.

[18] In *North Arkansas Electric Co-op, supra*, 185 NLRB at 551, n. 8, the Board overruled *Swift* to the extent that it was inconsistent with its decision in the later case.

As the Board found, "policy guides for 'make or buy' decisions can clearly be established and enforced, so that any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled" by the Employer.[19] Moreover, "the buyers cannot commit the Employer's credit for amounts above $5,000 without the concurrence of higher authority. * * * Nor can they cancel an order and select an alternate vendor without the concurrence of other officials if the amount involved exceeds $5,000." And, "in many instances the type of item to be procured will limit the buyer to a particular vendor." (Pet. App. D, pp. 62–63.)

Accordingly, the Board was justified in concluding that the Company had failed to demonstrate that there would exist a conflict of interest between the buyers' responsibilities to a union and their responsibilities to the Company.[20] It thus properly found the buyers to be employees covered by the Act.

II. THE BOARD WAS NOT REQUIRED TO CONDUCT A RULE-MAKING RATHER THAN AN ADJUDICATORY PROCEEDING TO DETERMINE WHETHER RESPONDENT'S BUYERS ARE EMPLOYEES COVERED BY THE ACT

The court below recognized that on reconsideration, the Board could find that respondent's buyers are not

[19] The Company has a management committee which determines whether any given item is purchased or made in house (A. 126).

[20] The Board added that the "Employer would still retain the power to discipline or discharge [buyers] * * * for improper performance of duty, subject only to such limitations as he might agree to during negotiations" with the union (Pet. App. D, p. 63).

true managerial employees. It held, however, that the agency could make that determination only in a general rule-making proceeding, and not in adjudicatory proceedings. The latter holding is contrary to settled principles governing the discretion of an administrative agency to select the appropriate procedure for deciding particular issues, and would require an inappropriate procedure for deciding the issue here.

In *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, this Court held that, while "[t]he function of filling in the interstices of the [Securities] Act should be performed, as much as possible, through [the] * * * quasi-legislative promulgation of rules to be applied in the future * * * any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise" (*id.* at 202). The Court added that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (*id.* at 203).

National Labor Relations Board v. *Wyman-Gordon Company*, 394 U.S. 759, reaffirmed these principles. The plurality opinion there recognized that "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein" (*id.* at 765). The concurring opinion of three other Justices emphasized that Congress had given the Board both quasi-legislative and quasi-judicial powers, that "[n]o language in the National Labor Relations Act requires that the grant or the exercise of one power was intended to

exclude the Board's use of the other," and that the choice between the two "lies primarily in the informed discretion of the administrative agency" (*id.* at 771, 772).[21]

The Board acted reasonably in determining the status of the Company's buyers in an adjudicatory, rather than a rule-making, proceeding. The court below assumed that the Board was "prescribing a new policy, not just with respect to 25 buyers in Wheatfield, N.Y., but * * * 'to fit all cases at all times'" (Pet. App. A, p. 43). However, as shown (pp. 27–28), the principle which the Board applied here—*i.e.*, that managerial employees are not excluded from the Act's coverage unless it is likely that there will be a conflict of interest between their job and their union responsibilities—is not novel; the contrary view ex-

[21] The factor in *Wyman-Gordon* which caused two Justices to dissent was not that the Board had formulated the requirement that the employer supply the union with the names and addresses of employees eligible to vote in a scheduled representation election in an adjudicatory proceeding, the *Excelsior* case, 156 NLRB 1236. Rather, it was that, by declining to apply the requirement in the *Excelsior* case itself, and instead directing that it be applicable to all election proceedings arising 30 days thereafter, the Board appeared to be engaging in rule-making without complying with Section 4 of the Administrative Procedure Act. See 394 U.S. at 775–777, 780–781. As Justice Douglas stated, "I am willing to assume that, if the Board decided to treat each case on its special facts and perform its adjudicatory function in the conventional way, we should have no difficulty in affirming its action." *Id.* at 775–776. That is precisely what the Board has done here. The Board, after examining the facts of this particular case, held that the duties of the Company's buyers were not such as would be likely to create a conflict of interest, and thus deprive them of the protection of the Act. The determination was effective in the adjudicatory proceeding in which it was made.

pressed in *Swift* and not reflected in the language of the Act was the aberration. Moreover, in adjudicating the case the Board reached a decision tailored to the particular facts; it did not state a conclusion which purported to be applicable to all buyers (Pet. App. D, pp. 62–64; Pet. App. E, p. 75).

The court below, in support of its conclusion that the Board must conduct a rule-making proceeding as to the coverage of all buyers, stated that "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter" (Pet. App. A, p. 43). But this fact militates against a rule-making, rather than an adjudicatory, proceeding. In view of this large number of buyers in American industry and the fact that their duties vary from industry to industry, company to company, and even among employees within the same company, a proceeding which attempted to formulate criteria to govern the entire class would be likely to produce only broad general standards of little utility.[22] It is doubtful that a rule could be framed with sufficient particularity to make clear which of the many thousands of buyers are excluded from coverage of the Act. Application in concrete cases would still necessitate recourse to the

[22] For example, the fact that a buyer can commit $5,000 on his signature alone may be significant where the items purchased are low priced, but not where they are high priced. Similarly, the fact that the buyer has discretion to choose suppliers may have less significance where the potential suppliers are limited in number, than where there is a large pool of suppliers to choose from. Moreover, one buyer's detailed instructions may still leave him with discretion in more important areas than do other buyers' less detailed instructions.

Board's settled practice of deciding the applicability of the Act to particular types of employees on a case-by-case basis.[23]

Accordingly, by requiring the Board to conduct a rulemaking proceeding to determine the application of the Act to all buyers without any particular factual situation before it, the court below has required the Board to follow a procedure which is likely to impede, rather than enhance, a prompt and judicious resolution of that question.

CONCLUSION

The judgment of the court below should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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[23] Since this Court's decision in *Wyman-Gordon*, however, the Board has instituted rule-making proceedings in those areas where, in its judgment, they were appropriate—*e.g.*, the promulgation of standards for the exercise of jurisdiction over private colleges and universities. (See Pet. App. A, pp. 40–41, n. 14.)

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or

any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

The relevant provisions of the Administrative Procedure Act (5 U.S.C. § 551, *et seq.*) are as follows:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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